Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THEODORE H. FRIEDMAN,

Petitioner,

—v.—

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order of disbarment, based upon findings of fact supported by only a preponderance of the evidence rather than a higher standard of proof, denies the affected attorney the due process of law required by the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Petitioner, Theodore H. Friedman, petitions for a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, substantially confirming the Report of the Special Referee and ordering petitioner disbarred. The Court of Appeals of the State of New York dismissed petitioner's appeal as of right without reaching the merits of the case, upon the ground that the appeal presented no substantial constitutional question directly involved.

OPINIONS BELOW

The report of the Special Referee, which is unreported, is reprinted in the Appendix at 1a-26a. The *per curiam* opinion and order of the Appellate Division, First Department, also unreported, is reprinted at 27a-54a. The unreported order of the Court of Appeals of the State of New York is reprinted at 55a-56a. The order of the Appellate Division granting in minor part and otherwise denying a motion for reargument is reprinted at 57a.

JURISDICTION

The order of the Appellate Division, First Department, was entered on March 22, 1994. The order of the New York Court of Appeals was entered on May 5, 1994. A motion for reargument in the Appellate Division, dated April 5 and submitted April 21, 1994, was granted to the extent of changing two words in the opinion and otherwise denied on June 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).[1]

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[1] The time for appeal to the New York Court of Appeals would have expired on April 22, 1994, 30 days after the decision of the Appellate Division. N.Y. Civ. Prac. L. & R. 5513(a) (McKinney 1978). The notice of appeal was filed on April 6, 1994. Under New York practice, Civ. Prac. L. & R. 5517(a), the time for appeal is not extended by a motion in the lower court for reargument or similar relief. N.Y. Civ. Prac. L. & R. 5517(a) (McKinney 1978); David D. Siegel, *New York Practice* § 532, at 834 (2d ed. 1991). It is clear now, in any event, that the New York judgment is final.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, a member of the New York bar since 1957, has been ordered to be disbarred on findings of misconduct in two cases, one in 1982, the other in 1985. As stated by the Special Referee who made the adverse findings, petitioner

> is a lawyer of exceptional abilities and energies who has risen to the top of his profession. He has argued cases before the United States Supreme Court and is considered by his peers to be one of the finest, if not the finest, personal injury trial lawyer in New York.

It is also pertinent background here that (1) the first set of charges arose from a case in the United States District Court for the Southern District of New York where the result had been a letter of censure by that court in June, 1986, and (2) the second set of charges included centrally accusations of subornation of perjury on which petitioner had been tried and acquitted by a criminal jury in November, 1988. No findings of misconduct were made for any acts by petitioner during the years after 1985 when he conducted an active and prominent courtroom practice.

Since the question for review is the standard of proof, the lengthy record of disciplinary hearings, exceeding 4,000 pages of transcripts plus voluminous exhibits, may be summarized for present purposes with relative brevity:

In *Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5577, a wrongful death action in the Southern District of New York, there was sharp controversy over an exhibit offered by petitioner as plaintiff's counsel on the subject of damages. The trial judge ruled that petitioner could present the contents of the exhibit in final argument but that it would not be received in evidence and placed physically before the jury. Later, however, after the verdict, it was discovered that the exhibit had been placed in the jury room along with some 300 others requested by the jury. The judge ordered motion papers, and then testimony, on this subject.[2]

In an affidavit sworn March 8, 1982, petitioner stated that counsel assisting him at the trial, Frederick J. Cuccia, had been responsible for handling the exhibits and that Mr. Cuccia had therefore been the person who had (mistakenly) put the excluded exhibit in the pile to go to the jury. Mr. Cuccia, though served promptly with that affidavit, claimed he had not read it until months later, and that he then took sharp issue with petitioner's account. The dispute continued in a hearing before the trial judge, whose adverse conclusions resulted in multiple charges against petitioner before the federal court's disciplinary committee.

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[2] The summary regarding the *Mowen* case is taken largely from the Report of the Special Referee (2a-9a).

In the investigation required under the federal committee's procedures, petitioner admitted that he had identified Mr. Cuccia as having sent the exhibit to the jury room without having direct perceptual knowledge of that as a fact. He acknowledged that his affidavit reported as a fact an inference rather than direct knowledge. No other charges against petitioner were pressed, following full investigation.

In those circumstances, the federal disciplinary committee ordered that appellant be given a letter of censure, which was dated June 23, 1986.

The same events were then made the subject of six counts of wrongdoing charged by the Appellate Division's Departmental Disciplinary Committee. The first and most serious, alleging that petitioner had placed the exhibit in the jury room, was found by the Special Referee not to have been proved by a fair preponderance of the evidence. He went on, however, to find petitioner guilty on the five remaining counts -- the admitted charge of swearing an affidavit without personal knowledge, and other charges also relating to petitioner's statement about Mr. Cuccia's role in handling the exhibit found in the jury room.

The Appellate Division dismissed Count 3, alleging a recklessly false statement, for inconsistency with the charge of knowing falsity in Count 4. In all other respects it sustained the Referee's findings on the *Mowen* counts. In addition, though petitioner was found not to have put the exhibit in the jury room, the Court said he had "unfairly and reprehensibly cast his own guilt upon a blameless fellow member of the bar" (50a).

The second set of charges resulting in adverse findings, essentially tracking those on which petitioner had been acquitted by a jury, grew out of another wrongful death case, *Estate of Miriam Krieger v. City of New York*, N.Y. Co. Index No. 8228/80. While central portions of these charges seem graver than those in the *Mowen* case, they may be summarized even more briefly for present purposes.[3]

The case involved a horrible death in an elevator shaft of a City-owned building. It was charged, and the Special Referee found by a preponderance of the evidence, that petitioner, as counsel for the plaintiff decedent's estate, had coached a witness to testify falsely at the trial and to make false statements to opposing counsel. The Referee also found that petitioner had heard one of his witnesses testify falsely at trial and failed to take steps to correct this. Additional findings against petitioner were that he had failed adequately to supervise an investigator and to take remedial action when he should have recognized that the investigator was behaving improperly; that he had engaged in impermissible fee-splitting by arranging to pay an investigator 50% of his usual rate when billed and an additional 100% if the plaintiff succeeded in the case: and that he had paid, or acquiesced in the payment of, excessive fees to witnesses. The findings against petitioner embraced nine counts.

On two additional counts (12 and 15) growing out of the *Krieger* case, the Special Referee found a failure of the

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[3] Again, a fuller account will be found in the Report of the Special Referee (9a-18a).

Disciplinary Committee to prove its charges by a preponderance of the evidence.

It merits at least passing emphasis that the large record reveals, and even the Special Referee's sometimes cursory findings reflect, powerfully disputed issues of fact, on issues that a jury had earlier resolved in petitioner's favor.

The Standard of Proof

The petitioner urged as his first and major ground for his motion to disaffirm the report of the Special Referee that the due process of law requires a standard of proof higher than a preponderance as an evidentiary basis for disbarment. The petitioner called to the attention of the Appellate Division, the court of first instance for such matters, that most of the States, as well as the Federal Courts and Rule 18(C) of the American Bar Association's *Model Rules for Lawyer Disciplinary Enforcement* (1989), call for at least clear and convincing evidence. The argument was given short shrift by the Appellate Division, which ruled, citing *Matter of Capoccia*, 59 N.Y.2d 549 (1983), that New York's Court of Appeals had "conclusively determined that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence" (48a).

On petitioner's appeal to the New York Court of Appeals, that Court raised under its procedural rules a threshold question as to whether the constitutional issue of due process warranted its review. Petitioner urged in response that the issue was substantial, and pointed out that the decision in *Matter of Capoccia*, *supra*, had been made on insufficient briefs that failed, *inter alia*, to mention the

heavy weight of contrary authority, the bearing of the Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982), and other considerations of consequence. The Court proceeded, nevertheless, to dismiss the appeal on its own motion for want of a substantial constitutional question (55a-56a).

REASONS FOR GRANTING THE WRIT

Two conflicts, with the Fifth Circuit and the Supreme Court of Mississippi, are in themselves considerations favoring review by this Court. But the contrariety of decisions is much broader than that. Arrayed against New York's rule accepting a mere preponderance of the evidence as sufficient for disbarment is the law of 40 States and the federal courts as well as the American Bar Association's Model Rule on the subject. These numbers themselves are persuasive indicia of what due process requires. There are, in addition, inconsistencies, if not square conflicts, with decisions of this Court. This is an occasion, in sum, when the Court's authoritative review on certiorari would give widely valuable guidance on a significant and recurrent question of whether due process requires that attorney disbarment charges be proven by clear and convincing evidence, or whether a mere preponderance of the evidence may suffice to terminate an attorney's professional life.

1. The decision of the Appellate Division holding a preponderance of the evidence sufficient under the due process clause for findings leading to disbarment is in conflict with *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992), and *Netterville v. Mississippi State Bar*, 397 So. 2d 878 (Miss. 1981). Both of the latter courts require clear and convincing evidence in order to meet the demands of

due process. The Mississippi Court holds that even to support disciplinary sanctions less severe than disbarment, "clear and convincing evidence . . . is necessary in order to meet the requirements of due process." *Netterville,* 397 So. 2d at 884.

The fundamental divergence on this subject is far wider and more important than is reflected in the explicit rulings of the cited cases. Whether or not they expressly refer to due process, 40 States and the District of Columbia demand a standard higher than a preponderance to sustain an order of disbarment.[4] The usual formulation is "clear

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[4] Alabama: *Jackson v. Alabama State Bar*, 462 So. 2d 365, 369 (Ala. 1985); Arizona: *In re Levine*, 847 P.2d 1093, 1096-97 (Ariz. 1983); California: *Davidson v. State Bar*, 551 P.2d 1211, 1213 (Cal. 1976); Colorado: *People v. Sullivan*, 802 P.2d 1091, 1093 (Colo. 1990); Connecticut: *Statewide Grievance Comm. v. Friedland*, 609 A.2d 645, 647 (Conn. 1992); Delaware: *In re Morford*, 80 A.2d 429, 432 (Del. 1951); District of Columbia: *In re Thompson*, 583 A.2d 1006, 1007 (D.C. 1990); Florida: *Florida Bar v. Ragano*, 403 So. 2d 401 (Fla. 1981); Georgia: *In re Sliz*, 273 S.E.2d 177, 181 (Ga. 1980); Hawaii: *Disciplinary Bd. of Haw. Supreme Court v. Kim*, 583 P.2d 333, 335 (Haw. 1978); Idaho: *In re Jenkins*, 816 P.2d 335, 341 (Idaho 1991); Illinois: *In re Jafree*, 444 N.E.2d 143, 148 (Ill. 1982); Indiana: *In re Sekerez*, 458 N.E.2d 229, 234 (Ind.), *cert. denied*, 469 U.S. 856 (1984); Iowa: *Iowa State Bar Ass'n v. Kraschel*, 148 N.W.2d 621, 625 (Iowa 1967); Kansas: *In re*

(continued...)

[4](...continued)

Matney, 740 P.2d 598, 605-6 (Kan. 1987); Louisiana: *Louisiana State Bar Ass'n v. Mitchell*, 375 So. 2d 1350, 1352 (La. 1979); Maryland: *Attorney Grievance Comm. of Md. v. Kerpelman*, 438 A.2d 501, 506-7 (Md. 1981); Minnesota: *In re Miera*, 426 N.W.2d 850, 853 (Minn. 1988); Mississippi: *Mississippi State Bar v. Young*, 509 So. 2d 210, 213 (Miss. 1987), *petition dismissed*, 523 So. 2d 323 (Miss. 1988); *Attorney W.L. v. Mississippi Bar*, 621 So. 2d 235, 237 (Miss. 1993); Montana: *In re Goldman*, 588 P.2d 964 (Mont. 1978); Nebraska: *State ex rel. Nebraska State Bar Ass'n v. Douglas*, 416 N.W.2d 515, 521 (Neb. 1987), *cert. denied and appeal dismissed*, 488 U.S. 802 (1988); Nevada: *Copren v. State Bar*, 183 P.2d 833, 840 (Nev. 1947); New Hampshire: *Edes' Case*, 395 A.2d 498, 499 (N.H. 1978); New Jersey: *In re Gross*, 341 A.2d 336, 338 (N.J. 1975); New Mexico: *In re Sedillo*, 84 N.M. 10, 498 P.2d 1353 (1972); North Carolina: *In re Palmer*, 252 S.E.2d 784, 789-90 (N.C. 1979); North Dakota: *In re Lovell*, 292 N.W.2d 76, 82 (N.D. 1980); Ohio: Supreme Court Rules for the Government of the Bar, Rule V, § 6(J); *Cincinnati Bar Ass'n. v. Smith*, 67 Ohio St. 3d 71, 616 N.E.2d 190 (1993); Oklahoma: *State ex rel. Oklahoma Bar Ass'n v. Miskovsky*, 824 P.2d 1090, 1098 (Okla. 1991); Oregon: *In re Conduct of Paauwe*, 654 P.2d 1117, 1119 (Or. 1982); Pennsylvania: *Office of Disciplinary Counsel v. Ewing*, 436 A.2d 139, 142-43 (Pa. 1981); *Office of Disciplinary Counsel v.*

(continued...)

and convincing evidence." Georgia requires proof "beyond a reasonable doubt." *Matter of Sliz*, 273 S.E.2d at 181. Idaho calls for a "clear and undoubted preponderance." *Matter of Jenkins*, 816 P.2d at 338. The federal courts, *see In re Medrano*, 956 F.2d at 102, and Rule 18(C) of the American Bar Association's *Model Rules for Lawyer Disciplinary Enforcement* (1989) join in the vast majority demanding "clear and convincing evidence." All distinctly reject the position of New York and a handful of other States accepting a mere preponderance.

The imposing number of American jurisdictions holding the preponderance standard inadequate supply by the weight of their judgments powerful indications of the

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[4](...continued)

Shorall, 592 A.2d 1285, 1286, 1289, 1290, 1291 (Pa. 1991); Rhode Island: *Carter v. Folcarelli*, 402 A.2d 1175, 1177 (R.I. 1979); South Carolina: *In re Friday*, 208 S.E.2d 535, 537 (S.C. 1974); South Dakota: *In re Disbarment of Jaquith*, 117 N.W.2d 97, 98 (S.D. 1962); Utah: *In re McCullough*, 95 P.2d 13, 14, 17 (Utah 1939); Vermont: *In re Wright*, 310 A.2d 1, 9-10 (Vt. 1973); Virginia: *Seventh Dist. Comm. of Va. State Bar v. Gunter*, 183 S.E.2d 713, 717 (Va. 1971); Washington: *In re Little*, 244 P.2d 255, 259-60 (Wash. 1952); West Virginia: *Committee on Legal Ethics of W. Va. State Bar v. Smith*, 399 S.E.2d 36, 39-40 (W. Va. 1990); Wisconsin: *In re Sedor*, 245 N.W.2d 895, 899 (Wis. 1976); Wyoming: *Meyer v. Norman*, 780 P.2d 283, 291 (Wyo. 1989).

process that should be deemed to be due. In *Rivera v. Minnich*, 483 U.S. 574, 578 (1987), this Court pointed out

> that a principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions. In each of the three cases in which we have held that a standard of proof prescribed by a state legislature was unconstitutional, our judgment was consistent with the standard imposed by most jurisdictions.

2. New York's cursory opinion finding a preponderance sufficient for professional discipline, *Matter of Capoccia*, 59 N.Y.2d 549 (1983), reaffirmed now without further consideration, is at odds with a number of pertinent principles found in this Court's decisions. There was no semblance of the analysis called for by *Santosky v. Kramer*, 455 U.S. 745 (1982), which had reversed New York's preponderance standard for terminating parental rights and was not noticed by the New York Court of Appeals a year later in *Capoccia*. There was at best a superficial glance at *Addington v. Texas*, 441 U.S. 418 (1979), which called for a searching analysis rather than a passing distinction between civil commitment and disbarment. *See* 59 N.Y.2d at 553.

Upon even a curtailed look at *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and *Santosky* 455 U.S. 745, it is

patent that the New York Court, in accepting a preponderance, has not begun to examine the three factors that need to be balanced before reaching such a conclusion:

> the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.

Santosky at 754. When that examination is made, we submit, the New York minority rule on the standard for disbarment becomes unacceptable.

The rule is unacceptable, first, because disbarment is a deprivation "more substantial than mere loss of money", carrying with it "stigma", involving allegations of "fraud or some other quasi-criminal wrongdoing" and bearing "many of the indicia of a criminal trial." *Addington*, 441 U.S. at 424, 425, 426. Disbarment "is a punishment or penalty imposed on the lawyer" following from "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 550, 551 (1968). The interest at stake where loss of a profession or occupation is threatened need not be labored. As the Seventh Circuit said in *In re Fisher*, 179 F.2d 361, 370, *cert. denied*, 340 U.S. 825 (1950), quoting the sound observations of an Illinois appellate court:

> The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. . . . The court should, therefore, disbar in moderation.

This is, of course, no special or unique thought for lawyers. The courts have frequently recognized with

respect to other kinds of occupation that, one's work being a vital core of one's life, divestiture of other professional or occupational licenses requires a standard of proof higher than a preponderance. *E.g.*, *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987) (secondary school teacher); *Hogan v. Mississippi Bd. of Nursing*, 457 So. 2d 931 (Miss. 1984) (nurse); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993) (physician).

Moving to the second of the factors, the appraisal of the "risk of error," there is powerful basis for the argument, merely adumbrated here, that the public interest, on a fair balance, is not slighted by the overwhelming majority perception that the State ought to assume more than the minimal risk of error entailed by the preponderance standard before it strips lawyers or members of other occupations of the right to continue in the work of their lives. Like the proceeding in *Santosky*, a disbarment proceeding "bears many of the indicia of a criminal trial." 455 U.S. at 762. Here, as there, the State, unlike a private party, deploys massive resources against the individual - highlighted in this case by the unsuccessful criminal prosecution of petitioner that preceded the disbarment proceeding. *See id.* at 763-64. As the decision in *Santosky* also makes clear, the choice is not a simple one between a virtuous State and an allegedly unfit defendant. Even apart from the impact upon other people and interests, disbarment proceedings fall within the class of drastic threats and deprivations by the State calling for a standard above a preponderance.

Finally, the third factor, "the countervailing governmental interest supporting use of the challenged procedure," is at least as strong here as it was in *Santosky* against New York's preference for a preponderance.

Compared with the 35 States in *Santosky*, there are 40 here evidencing that "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." 455 U.S. at 767. It is true here, as it was in *Rivera*, 483 U.S. at 581, that

> [b]ecause the State has superior resources, . . . and because an adverse ruling in a . . . termination proceeding has especially severe consequences for the individuals affected, it is appropriate for society to impose upon itself a disproportionate share of the risk of error in such proceedings.

The New York Court of Appeals, in the cursory paragraph on this subject in *Capoccia*, 59 N.Y.2d at 552-53, never since elaborated or revisited, has never looked at this question for judgment.

Other departures in *Capoccia* from principles laid down by this Court may be noted briefly. The New York Court of Appeals said a preponderance was enough because the license to practice law was a "privilege, . . . more nearly to be classified as a property interest" than a "liberty" interest. 59 N.Y.2d at 553. In this the New York Court was twice wrong. The right to engage in a lawful occupation, a central aspect of a person's life, has long been recognized as a basic "liberty" protected by the Fourteenth Amendment. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976). Further, this Court "has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). Far more meaningful, and

neglected by the New York Court of Appeals, is the gravity of the proceeding and the deprivation the State seeks to effect, namely, the "quasi-criminal" quality of the disciplinary process and the "punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. at 550, 551.

3. In *Santosky v. Kramer*, reversing the New York Court of Appeals holding that a preponderance satisfied due process in parental rights termination proceedings, this Court noted the incongruous New York rules requiring "at least clear and convincing evidence in proceedings of far less moment." 455 U.S. at 767. Examples cited were the requirement of "clear and convincing evidence" for traffic infractions and "clear, positive and convincing evidence" for contract reformation. *Id.* The instances could have been multiplied. To add only two, New York demands "clear and convincing proof" to show a restrictive covenant affecting real property, *Huggins v. Castle Estates, Inc.*, 36 N.Y.2d, 427, 430 (1975), and "clear and convincing evidence" to establish that a decedent made a valid inter vivos gift, *Matter of Love*, 46 N.Y.2d 784, 784 (1978).

But there is a far more striking anomaly, vividly illustrated by this case and affecting disbarment proceedings quite generally. Like all or most States, New York demands "clear and convincing evidence" to prove fraud against anyone, no matter how villainous and no matter how purely monetary and relatively trivial the case may be. *Simcuski v. Saeli*, 44 N.Y.2d 442, 452 (1978). *See* also *Addington*, 441 U.S. at 424. In the present case, the petitioner has been found guilty by a mere preponderance of the evidence of fraud and subornation of perjury in disbarment proceedings terminating his professional life and

stigmatizing his reputation, having previously been tried and acquitted on criminal charges for the same alleged misconduct.

Under the law of New York, a lawyer, like a non-lawyer, sued for $500 for fraud, cannot be held liable without clear and convincing evidence. But the lawyer may be disbarred, and his career destroyed, on no more than a preponderance of the evidence. The self-contradiction points up dramatically the failure of the New York court to make the kind of rational analysis of the affected interests required by *Addington* and *Santosky*. Requiring clear and convincing evidence of fraud to recover a dollar's damages but allowing total termination of a professional career by disbarment on a mere preponderance of evidence of fraud displays the kind of unconsidered incongruity that is the antithesis of principles of due process at least as old as the Magna Carta - principles of "fundamental fairness . . . and . . . rationality that is an essential component of that fairness." *Schad v. Arizona*, 111 S. Ct. 2491, 2500 (1991).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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